

KLINEBURGER & NUSSEY

ATTORNEYS AT LAW

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Attorney for Plaintiffs, Joseph O'Keefe and Simmeria Café & Bistro, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSEPH A. O'KEEFE and SIMMERIA
CAFÉ & BISTRO, INC.,

Plaintiffs,

vs.

ACE RESTAURANT SUPPLY, LLC,
KOREY BLANCK and NICK BLANCK

Defendants.

CIVIL ACTION

NO. 11-1330

**ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE
DEFENDANTS' DEMAND FOR TRIAL DE NOVO**

AND NOW, this _____ day of _____, 2016, upon consideration of the Motion to Strike of Plaintiffs Joseph A. O'Keefe and Simmeria Café & Bistro, Inc., and the Court having reviewed (i) the Memorandum of Law in Support of the Motion submitted by Plaintiffs and (ii) and any opposition thereto, and for good cause shown, the Court hereby grants Plaintiffs' Motion, strikes Defendants' Demand for Trial De Novo, and orders the final entry of the arbitration award rendered in favor of Plaintiff in the amount of \$75,823.92.

IT IS SO ORDERED.

BY THE COURT:

Honorable R. Barclay Surrick, U.S.D.J.

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Attorney for Plaintiffs, Joseph O'Keefe and Simmeria Café & Bistro, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSEPH A. O'KEEFE and SIMMERIA
CAFÉ & BISTRO, INC.,

Plaintiffs,

vs.

ACE RESTAURANT SUPPLY, LLC,
KOREY BLANCK and NICK BLANCK

Defendants.

CIVIL ACTION

NO. 11-1330

MOTION TO STRIKE DEFENDANTS' DEMAND FOR TRIAL DE NOVO

1. On June 8, 2016, Plaintiffs were awarded \$75,823.92 in damages following arbitration in the above-captioned matter. See Exhibit A, attached to the accompanying Memorandum of Law.
2. On or about July 11, 2016, the clerk of the Court docketed Defendants' Demand for Trial De Novo. See Exhibit B, attached to the accompanying Memorandum of Law.
3. Defendants' Demand for Trial De Novo fails to comply with the rules of this Court as more fully described in the accompanying Memorandum of Law, which is incorporated herein.
4. As a result of said failures, Plaintiffs respectfully request that the Court strike Defendants' Demand and affirm the entry of the arbitration award as final judgment.

Respectfully submitted,

KLINEBURGER & NUSSEY

Dated: July 20, 2016

BY: /s/ Richard F. Klineburger, III
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Attorney for Plaintiffs, Joseph O'Keefe and Simmeria Café & Bistro, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSEPH A. O'KEEFE and SIMMERIA
CAFÉ & BISTRO, INC.,

Plaintiffs,

vs.

ACE RESTAURANT SUPPLY, LLC,
KOREY BLANCK and NICK BLANCK

Defendants.

CIVIL ACTION

NO. 11-1330

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO
STRIKE DEFENDANTS' DEMAND FOR TRIAL DE NOVO**

Plaintiffs, Joseph A. O'Keefe and Simmeria Café & Bistro, Inc., file this memorandum of law in support of their Motion to Strike Defendants' Demand for Trial De Novo. Because Defendants have failed to meet the requirements of the rules for appealing an arbitration award, their Demand should be stricken and the arbitration award entered as final judgment in the above-captioned matter.

I. Defendants' Demand is Untimely Pursuant to 28 U.S.C.S. 657(c)(1) and Local Rule 53.2.

Subsection 7 of the Local Rule of Civil Procedure 53.2 and 28 U.S.C.S. 657(c)(1) provide that arbitration awards may be appealed within thirty (30) days from the date the award is filed on the docket. The arbitration award in this matter was entered on June 8, 2016.

Defendants' Demand, while dated July 6, 2016, was in fact not filed until July 11, 2016 according to [the stamp appearing on the filing]. This delay is undoubtedly due to Defendants having used ordinary mail to submit its papers to the Court, rather than the standard Electronic Case Filing system. As a result, Defendants' Demand arrived several days after the filing deadline, which would have been June 8, 2016.

Once the 30-day period has passed, a party cannot demand a trial *de novo* absent motion to the Court for an extension pursuant to Fed. R. Civ. P. 6(b). Hamilton v. J.C. Penney Co., 127 Fed. App'x. 47 (3d. Cir. 2005). It is clear that Defendants did not file any motion for an extension of time. Therefore, its Demand for Trial De Novo is a nullity under the Rules applicable to this Court, and it is proper to strike the Demand and enter the arbitration award as a final judgment of the Court.

II. Defendants' Demand Also Fails to Comply with Local Rule 5.1.2, Which Requires Filing by the Court's Electronic Case Filing System ("ECF").

There is also no record of Defendants having filed their Demand via ECF as required by Local Rule 5.1.2(2)(b). Rather, Defendants simply mailed their Demand to the Court and to undersigned counsel on or about July 6, 2016, which was not filed until July 11, 2016. There is likewise no record that Defendants' counsel is otherwise excused from the requirements of electronic filing pursuant to Local Rule 5.1.2(3).

The Third Circuit has firmly declined to consider hard copies of papers as timely filed when an attorney knew or should of known that the papers were required to be filed electronically. In Kanoff v. Better Life Renting Corp., counsel for Kanoff had until March 17, 2008 to file a notice of appeal with the District Court, which notice was required to be filed electronically by local rules. Instead, counsel filed a hard copy with the clerk, which arrived after the March 17, 2008 deadline. The Third Circuit upheld the District Court's finding that although

the other party was not greatly prejudiced by the error and resulting delay, counsel knew or should have known of the electronic filing requirement, and “counsel’s fault in failing to follow established filing requirements outweighed the absence of prejudice (as well as other countervailing factors).” Kanoff v. Better Life Renting Corp., 350 Fed. App’x 655, 657 (2009). As a result, the Court held that Kanoff was not entitled to an appeal, or to the reformation of the docketed filing date of the hard copy.

The circumstances here are virtually identical to those in Kanoff. Counsel filed a hard copy of a document which was required to be filed electronically, said hard copy was delivered to the Court after the expiration of the deadline to appeal a decision, and counsel knew or should have known that ECF was the required method of filing. As such, Defendants are not entitled to appeal the award granted to Plaintiffs on June 8, 2016 following arbitration.

III. Conclusion.

For the foregoing reasons, Plaintiffs respectfully request that their Motion to Strike be granted and the arbitration award entered as final judgment.

Respectfully submitted,

KLINEBURGER & NUSSEY

Dated: July 20, 2016

BY: /s/ Richard F. Klineburger, III
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Facsimile: (856) 428-7530
Attorney for Plaintiffs, Joseph O’Keefe and
Simmeria Café & Bistro, Inc.

EXHIBIT A
Plaintiffs' Motion to Strike

RBS

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. O'KEEFE
SIMMERIA CAFE' & BISTRO, INC.

: CIVIL ACTION

v.

ACE RESTAURANT SUPPLY, LLC
KOREY BLANCK
NICK BLANCK

: NO. 11-1330

FILED

JUN 08 2016

MICHAEL E. KUNZ, Clerk
By [Signature] Dep Clerk

ARBITRATION AWARD
PURSUANT TO LOCAL RULE 53.2

AND NOW this 8th day of JUNE, 2016 we the undersigned arbitrators having been duly
certified and sworn and having heard the above captioned civil action on 8 JUNE 2016

_____, do hereby make the following award pursuant to Local Civil Rule 53.2: IN FAVOR OF PLFTS,
JOSEPH A. O'KEEFE AND SIMMERIA CAFE & BISTRO, INC. AND
AGAINST DFTS. ACE RESTAURANT SUPPLY, LLC AND NICK
BLANCK ~~IN THE~~ ON ALL OF PLAINTIFFS' COUNTS IN THE
SUM OF \$75823.92, WHICH SUM REPRESENTS TREBLE DAMAGES
PURSUANT TO THE RICO STATUTE, AS PLEADED BY PLAINTIFFS,
PLUS COUNSEL FEES AND COSTS AS DETERMINED BY THE
COURT. AS TO CLAIMS AGAINST KOREY BLANCK, WE FIND IN
FAVOR OF KOREY BLANCK.

[Signature]
Chairperson

[Signature]
Arbitrator
[Signature]
Arbitrator

NOTICE

This award will become a final judgment of the court without the right of appeal, unless a party files
with the court a demand for a trial *de novo* within thirty days after the entry of the arbitration award.

ARB14
Mailed 6/8/16
R Klueber
J Froelich
J Thiel

EXHIBIT B
Plaintiffs' Motion to Strike

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. O'KEEFE and SIMMERIA :
CAFE & BISTRO, INC., :
Plaintiffs : Civil Action No. 11-1330
:
v. :
ACE RESTAURANT SUPPLY, LLC, :
KOREY BLANCK and NICK BLANCK, :
Defendants :

DEFENDANTS' DEMAND FOR TRIAL DE NOVO

The Defendants Ace Restaurant Supply, LLC, Korey Blanck and Nick Blanck, by and through their counsel, J. Christopher Froelich, Esquire, hereby demand a trial de novo in the above captioned action wherein an arbitration award was filed with the Clerk on June 8, 2016.

Respectfully submitted,

LAW OFFICE OF J. CHRISTOPHER FROELICH,
P.C.

By: _____

J. Christopher Froelich, Esquire
I.D. #77409
Attorney for Defendants
116 East Penn Avenue
P.O. Box 101
Robesonia, PA 19551-0101
(610) 693-5520

Dated: 7/16/16

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

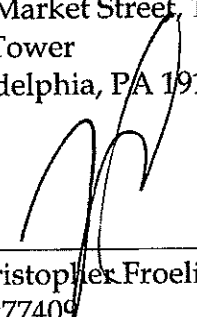
JOSEPH A. O'KEEFE and SIMMERIA :
CAFE & BISTRO, INC., :
Plaintiffs : Civil Action No. 11-1330
:
v. :
ACE RESTAURANT SUPPLY, LLC, :
KOREY BLANCK and NICK BLANCK, :
Defendants :

CERTIFICATE OF SERVICE

I, J. Christopher Froelich, Esquire, on the 6th day of July, 2016, hereby certify that a true and correct copy of the Defendants' Demand For Trial De Novo was served upon the following via first class mail:

Jacob T. Thielen, Esquire
O'KEEFE, MILLER & THIELEN
22 East Main Street
Fleetwood, PA 19522

Richard F. Klineburger, III, Esquire
KLINEBURGER & NUSSEY
1500 Market Street, 12th Floor
East Tower
Philadelphia, PA 19102



J. Christopher Froelich, Esquire
I.D. #77409
Attorney for Defendants
116 East Penn Avenue
P.O. Box 101
Robesonia, PA 19551-0101
(610) 693-5520

Dated: July 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2016, I caused a copy of the foregoing Motion to Strike Defendants' Demand for Trial De Novo to be filed with the Clerk of the Court via the CM/ECF system, thereby serving same upon all counsel of record.

Dated: July 20, 2016

BY: /s/ Richard F. Klineburger, III
RICHARD F. KLINEBURGER, III, ESQ.